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No. 90-557

In The

Supreme Court of the United States

October Term, 1990

MICHAEL S. CARDWELL,

Petitioner,

vs.

ROCKFORD MEMORIAL HOSPITAL,
a Corporation, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review a decision of the Supreme Court of Illinois regarding the construction of a state statute when no federal question has been raised, pressed or passed upon at any stage of the state court proceedings below.

2. Whether the Fourteenth Amendment Due Process Clause is applicable where a physician who is suspected of having a substance abuse problem voluntarily submitted to a psychiatric evaluation rather than invoking the procedural protection triggered by acceptance of a summary suspension of his hospital staff privileges.

3. Whether there is any state action which would invoke the protection of the United States Constitution when all of the acts complained of by a physician are alleged to have been committed by a private hospital and its employee.

THE PARTIES

Rockford Memorial Hospital is an Illinois not-for-profit corporation. It is a subsidiary of Rockford Memorial Corporation, an Illinois not-for-profit corporation. Rockford Memorial Hospital has no stock and Rockford Memorial Corporation is its sole member.

Terry A. White is an employee of Rockford Memorial Hospital.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Rockford Memorial Hospital, a Corporation, and Terry A. White, Assistant Administrator of Rockford Memorial Hospital, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Illinois Supreme Court's decision in this case.

OPINIONS BELOW

The order of dismissal of the circuit court is unreported and appears in the petition for writ of certiorari, pp. App. 23-App. 25. The opinion of the Appellate Court of Illinois, Second Judicial District, is reported at 183 Ill. App. 3d 1072, 132 Ill. Dec. 516, 539 N.E.2d 1322, and is reprinted in the petition for writ of certiorari, pp. App. 12-App. 22. The petition for rehearing in the Supreme Court of Illinois was denied May 31, 1990, and the opinion of that court is reported at 136 Ill. 2d 271, 144 Ill. Dec. 109, 555 N.E.2d 6, and is reprinted in the petition for writ of certiorari, pp. App. 2-App. 11.

JURISDICTION

The petitioner asserts that this Court has jurisdiction to review the decision of the Supreme Court of Illinois in this case pursuant to 28 U.S.C. § 1257(a).[1] Review of the opinions below reveals that the state statute involved in this case was never "drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States," as is required by section 1257(a). Accordingly, the respondents submit that this Court does not have jurisdiction to review that decision.

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[1] The petition for writ of certiorari cites 28 U.S.C. § 1257(3) [sic] as jurisdictional authority. As there is no subsection (3) respondents assume that this is a typographical error and that petitioner is relying on subsection (a) to that statute.

STATEMENT OF THE CASE

In October, 1984, petitioner, Dr. Michael Cardwell (hereinafter "Cardwell"), a perinatologist (a specialist in the care and treatment of high risk fetuses), was employed by respondent, Rockford Memorial Hospital (hereinafter "Hospital"), as the Medical Director of the Department of Perinatology pursuant to a written contract. Respondent, Terry White (hereinafter "White") was Cardwell's immediate supervisor.

In August, 1985, White and several other Hospital employees became aware that Cardwell might have substance abuse or emotional problems.[2] On August 29, 1985, four employees of the Hospital, including White, formed a committee to confront Cardwell about the problems which were adversely affecting the quality of Cardwell's treatment of his patients. Cardwell was advised that if he did not submit to an evaluation by an expert on treatment of impaired physicians that his staff privileges would be summarily suspended, an action which would have automatically triggered certain procedural protections under

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[2] The facts and circumstances leading to the conclusion that Cardwell may have had a substance abuse problem are outlined at length in the opinion of the Illinois Appellate Court found reprinted in the petition for writ of certiorari. (Pet. App. 13-App. 15).

the Hospital's bylaws.[3] Cardwell agreed to the evaluation. The record is silent on the results of that evaluation.[4]

On December 11, 1987, Cardwell filed a four-count amended complaint against his former employer, the Hospital, and against his former supervisor, White, individually and as Assistant Administrator of the Hospital, which alleged common law theories of slander, "coercion," intentional infliction of emotional distress and intentional interference by White with Cardwell's employment contract with the Hospital.

The defendants filed a joint motion to dismiss the amended complaint pursuant to section 2-619 of the Illinois Code of Civil Procedure. ILL. REV. STAT. (1985), Ch. 110, § 2-619(a)(9). The defendants argued that they had

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[3] Cardwell did not have his staff privileges at the Hospital suspended. As a result none of the procedural protections, such as a right to hearing provided by the Hospital bylaws (A.1-A.5), and the Illinois Hospital Licensing Act or its implementing regulations, 77 Ill. Adm. Code § 250-310(a)(3) (1984), were triggered. Had Cardwell refused the exam and accepted summary suspension he would clearly have been entitled to such procedural protections as a limit of ten days on the temporary suspension, written notification of recommendations for further action within seven days, and the right to a hearing on any adverse decisions concerning revocation or limitation of his staff privileges. (A.1-A.5). Cardwell remained on staff at the Hospital until his resignation in 1986.

[4] In accordance with Rule 15.1 of the Rules of The Supreme Court of The United States, respondents note that the petitioner's Statement of the Case contains a factual misstatement. Although petitioner claims that the evaluation showed no evidence of impairment, as the Supreme Court of Illinois noted, "the record is silent as to the results of the evaluation." (Pet. App. 4).

absolute immunity from civil damages for the acts alleged under the terms of section 10.2 of the Illinois Hospital Licensing Act. ILL. REV. STAT. (1985), Ch. 111½, ¶ 151.2. While the trial court rejected the concept of absolute immunity, it did find that the defendants had presented affirmative matters which defeated all claims presented under a test of conditional immunity. (Pet. App. 23-App. 24).

Cardwell appealed from the order dismissing his amended complaint, arguing on appeal that the defendants' section 2-619 motion to dismiss was not properly granted because the affidavits and deposition submitted in support of that motion were not properly "affirmative matters" within the meaning of that statute, but merely contradicted his well pleaded factual allegations. (Pet. App. 16-App. 17).

The Appellate Court held that the trial court's conclusion that the provisions of section 10.2 of The Hospital Licensing Act granted only conditional immunity was incorrect. (Pet. App. 19). The Appellate Court found that the "plain and unambiguous language of section 10.2" granted absolute immunity from civil damages for the conduct alleged, and upheld the order of dismissal on that basis. (Pet. App. 19).

Having received leave to appeal, Cardwell filed briefs with the Illinois Supreme Court which made two arguments: 1) that under common law principles of statutory construction section 10.2 of the Illinois Hospital Licensing Act should not be read as conferring a grant of absolute immunity from civil damages; and 2) that the

defendants had not followed proper motion practice at the trial court level.

The Supreme Court of Illinois affirmed the Appellate Court's holding that the language of section 10.2 was a grant of absolute immunity from civil damages to hospitals, their agents and employees, when they were acting in a professional review capacity. (Pet. App. 9-App. 11). Because this issue was dispositive of the claim the court found other matters raised in the state courts below to be "irrelevant." (Pet. App. 11).

REASONS FOR DENYING THE PETITION

This Court should deny the petition for certiorari because (1) at no time in the proceedings below was any federal question raised, pressed or passed upon; (2) no privacy rights protected by the Due Process Clause have been violated because Cardwell volunteered to submit to the psychiatric evaluation; and (3) all of the acts alleged by Cardwell were committed by a private hospital and its employee.

1. This Court lacks jurisdiction to review the decision of the Supreme Court of Illinois because no federal question was "pressed or passed upon" in the state courts.

Petitioner relies upon 28 U.S.C. § 1257(a) to give this Court its jurisdiction to review a decision of the Illinois Supreme Court. That statute confers upon the Court the jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State . . . where the

validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . . " This jurisdictional grant is commonly referred to as "federal question" jurisdiction.

This Court has held that, for the validity of a state statute to have been "drawn in question" for purposes of federal question jurisdiction, the federal question must have been "pressed or passed upon" in the state courts. *Clark v. Jeter*, 486 U.S. 456, 460 (1988) (*quoting Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988)). For a federal question to have been "pressed or passed upon," it must have been "expressly asserted" during the state court proceedings, or, at a minimum, the arguments made must have been "adequate to raise" the issue. *Clark*, 486 U.S. at 460.

A review of the pleadings and decisions from the state court proceedings in this case reveals that the state courts were asked only to construe state statutes in a manner consistent with common law principles of statutory construction and legislative intent. (Pet. App. 2-App. 25). None of the state courts ever considered the question of whether the Illinois Hospital Licensing Act violated the United States Constitution – because that question was never put to them by any of the parties.

Indeed, the Statement of the Case contained in Cardwell's petition – and its apparent violation of the Rules of this Court – highlight the fact that no federal question was raised during the state court proceedings. Rule 14.1(h) of this Court's Rules requires that in cases where a review of a state court decision is sought, the petitioner

must specify in his statement of the case "the stage in the proceedings . . . at which the federal questions sought to be reviewed were raised . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction . . . . " Sup. Ct. R. 14.1(h). The Statement of the Case in Cardwell's Petition makes no attempt to comply with this requirement, and, in fact, compliance would be impossible.[5]

The decision of the Illinois Supreme Court is nothing more than a classic exercise in the construction of a state statute. The court examined the Illinois Hospital Licensing Act in light of its statutory framework, the expressed goals of the Illinois General Assembly, and common law principles of statutory construction. It arrived at the conclusion that the Illinois Hospital Licensing Act conferred absolute immunity from civil liability on respondents for the conduct of which Cardwell complained, and thus that the dismissal of his complaint was entirely proper.[6] At no

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[5] The lack of a federal question is also underlined by Cardwell's apparent failure to comply with Rule 29.4(c) of the Supreme Court Rules. To date the respondents have received no notice that a copy of Cardwell's petition for writ of certiorari has been filed with the Attorney General for the State of Illinois, nor has a copy of the notice that 28 U.S.C. § 2403(b) may be applicable, been received.

[6] Petitioner seems distressed that Illinois is the only state he could find which had granted such an absolute immunity. Respondents see no relevance to that argument, and would simply note that it is diversity, rather than conformity, which is the hallmark of a federal system.

time did Cardwell, or anyone else, claim that the statute so construed would be repugnant to the Constitution of the United States.

As this Court stated in *Clark*, "[t]his question of how to interpret the [state] statute ultimately is a matter of state law." *Clark*, 486 U.S. at 460. Although the Court in *Clark* was considering a question of federal preemption of a state statute, the principle involved is the same. The Supreme Court of Illinois is the ultimate arbiter on the interpretation of Illinois statutes. In this cause that court was called upon only to interpret an Illinois statute pursuant to Illinois law. This Court should refuse to review or upset the state court pronouncement on the meaning of a state statute.

2. Because Cardwell voluntarily submitted to psychiatric evaluation, rather than invoking the procedures involved in a summary suspension, no Constitutionally created privacy rights have been violated.

When Cardwell was confronted by a committee of individuals at the Hospital concerning their belief that he might be suffering from substance abuse problems he was given a choice – submit to psychiatric evaluation *or* face summary suspension of staff privileges at the Hospital. (Pet. App. 15). Had Cardwell chosen to accept summary suspension his staff privileges would have been only temporarily revoked (no more than ten days) and, in accordance with the Hospital bylaws and the Illinois Administrative Code, he would have then been entitled to "due process and fair hearing." *See Tunca v. Lutheran*

General Hospital, 844 F.2d 411, 413 (7th Cir. 1988); 77 Ill. Adm. Code § 250-310(a)(3) (1984); (A.1-A.5).

Cardwell, in his petition for writ of certiorari, relies on a line of opinions by this Court which discuss the concept of due process as protecting the right of individuals to be free from involuntary and unreasonable intrusion of their person by the State. (Pet. 7). These opinions simply have no application to this case since Cardwell consented to the psychiatric evaluation rather than choosing the avenue of a hearing which ultimately could have resulted in permanent loss of staff privileges at the hospital.

In *Rochin v. California*, 342 U.S. 165, 166 (1951), relied on by Cardwell, the petitioner had his stomach pumped, against his will and without a hearing on the propriety of the invasion, at the direction of law enforcement officers. Unlike *Rochin*, Cardwell was afforded a choice and chose not to have a hearing. Unlike *Rochin*, Cardwell consented to the psychiatric evaluation which he later underwent. And, unlike *Rochin*, Cardwell's person was not physically invaded. Other authority cited by Cardwell is similarly distinguishable.[7]

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[7] Cardwell also cites *Olmstead v. U.S.*, 277 U.S. 438 (1928) and *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891), both of which involve involuntary physical invasions of the person by the State.

3. The acts alleged by Cardwell all involve a private hospital and its employee. There is no state action which would invoke the Constitutional protection asserted by Cardwell.

Moreover, Cardwell cannot establish a violation unless he can show that he was deprived of some protection afforded to him by the U.S. Constitution by a state (rather than a private) actor. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974); *see also NCAA v. Tarkanian*, 488 U.S. 179 (1988). Cardwell does not dispute that the Hospital and its administrator in this case are private actors, instead arguing that because the State of Illinois regulated the Hospital it is therefore "impregnated with governmental character." (Pet. 8).

This Court has established that the simple fact that a private actor is subject to extensive state regulation does not, by itself, convert its actions to that of the State. *Jackson*, 419 U.S. at 350. The determinative question is "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351.

The United States Court of Appeals for the Seventh Circuit has had the opportunity to address the issue of whether a heavily regulated private hospital is a state actor within the meaning of the Fourteenth Amendment. In *Spencer v. Lee*, 864 F.2d 1376 (7th Cir. 1989), *cert. denied* ___ U.S. ___, 110 S.Ct. 1317 (1990) the court held that a private hospital and private physician are not state actors in an involuntary commitment case despite extensive state regulation. *See also Tunca*, 844 F.2d at 413-414 (7th Cir. 1988). The *Tunca* opinion is especially enlightening in

view of the fact that the plaintiff in that case urged that the nexus between the private hospital and the state was created by the regulatory scheme of the Illinois Hospital Licensing Act. *Tunca*, 844 F.2d at 413. The federal appellate court, discussing the same Act relied on by Cardwell, wrote:

> There is no proof here beyond Dr. Tunca's 'say so' that the hospital's consideration of the alleged hearsay was directed by the State of Illinois.
>
> * * *
>
> Dr. Tunca's allegation that Lutheran General is a state actor simply because the State of Illinois requires it to develop procedural guidelines for considering applicants for medical staff privileges is not supported by the law in this circuit. *Tunca*, 844 F.2d at 413.

Similarly, Cardwell cannot support his allegation that the Hospital here is a state actor simply because the State of Illinois encourages it, through the Hospital Licensing Act, to engage in effective and honest self-policing.[8] Action by a private party pursuant to a state statute,

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[8] That the State has a significant interest in encouraging active, honest and candid peer review by health care providers has never been disputed by Cardwell. Congress has specifically found that the increasing incidence of malpractice and the need for improved health care is a "nationwide problem [that] can be remedied through effective professional peer review" and that the "threat of private money damage liability . . . unreasonably discourages physicians from participating in effective professional peer review." 42 U.S.C. § 11101.

without "something more," is not enough to characterize an individual as a state actor. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). The Hospital was under no "compulsion" from the State in acting as alleged. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970). The State of Illinois took no part, either directly or coercively, in any of the actions alleged by Cardwell, and therefore Cardwell cannot show that he has been deprived of his Constitutional rights through any state action.

CONCLUSION

For all of the reasons set forth above, this Court should deny the petition for writ of certiorari in this cause.

Respectfully submitted,

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APPENDIX

EXHIBIT B TO PLAINTIFF'S
AMENDED COMPLAINT[9]

BYLAWS
MEDICAL STAFF OF THE
ROCKFORD MEMORIAL HOSPITAL

* * *

ARTICLE VI – CORRECTIVE ACTION

* * *

Section 2 – Summary Suspension

A. Any of the following, the President of the Staff, Chairman of the Credentials Committee, Chairman of a clinical department, Administrative Vice-President for Medical Affairs, or the President, shall have the authority to summarily suspend a Staff member whenever immediate action is in the best interest of patient care in the Hospital. This action shall become effective immediately and cover all or a designated portion of that Staff member's clinical privileges. Such action shall be immediately documented in writing to the President of the Staff who shall bring the matter before the Medical Board as soon as possible but not longer than five (5) days after receipt of the document. Such action shall be processed as outlined in ARTICLE VII of these bylaws.

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[9] Only those provisions of the Hospital bylaws relevant to the issues raised in the petition for writ of certiorari are reproduced in the appendix to respondents' brief in opposition. The bylaws which were in effect at the time of acts alleged in the amended complaint are in the record, in their entirety, as Exhibit B to the amended complaint.

* * *

C. A temporary suspension of all or part of a Staff member's privileges may be imposed for a period not to exceed ten (10) days, during which period an investigation shall be made by a committee consisting of the following:

1. Representative of the Medical Board who shall be chairman of the committee.
2. One (1) member appointed by the President of the Medical Staff.
3. A member of the involved Staff member's department, other than the chairman of the department.
4. Vice-President for Medical Affairs.

A report with its recommendations shall be made by the committee to the Medical Board within seven (7) days of notification of the suspension and the Medical Board shall act.

D. Any recommendation by the Medical Board for reduction, suspension or revocation of clinical privileges, or for the suspension or expulsion from the Staff, shall entitle the affected practitioner to the procedural rights provided in these bylaws under ARTICLE VII.

ARTICLE VII – HEARING AND APPELLATE REVIEW PROCEDURE

Section 1 – Right to Hearing and to Appellate Review

A. When any applicant for Staff membership or Staff member receives notice of a recommendation of the Medical Board that, if ratified by decision of the Board of Directors, will adversely affect his/her appointment or

reappointment to or status as a member of the Staff or his/her exercise of clinical privileges, he/she shall be entitled to a hearing before an Ad Hoc Appellate Hearing Committee which shall report its recommendations to the Medical Board within a reasonable time limit.

B. If the recommendation of the Medical Board, following such hearing, is still adverse to the affected applicant or Staff member, the Medical Board shall submit its recommendations, together with the record of the prior action taken with respect to the matter, to the Medical Affairs Committee of the Board of Directors for its review and recommendations to the Board of Directors for action within a reasonable time limit.

C. If any decision of the Board of Directors as to an application for appointment, reappointment to, or status as a member of the Staff is contrary to the last recommendation of the Medical Board, the Board of Directors shall refer the matter to the Joint Conference Committee for further prompt review and recommendation, and upon receipt of such recommendation, final action shall be taken by the Board of Directors within a reasonable time limit.

Section 2 – Composition of Appellate Hearing Committee

The Appellate Hearing Committee shall be composed of the chairman of each department of the Staff, one (1) member of the Staff at large, who shall be appointed by the President of the Staff and who shall be designated as chairman of the committee, and one (1) member of the Board of Directors who shall be appointed by the Chairman of the Board of Directors.

Section 3 – Request for Hearing

A. The affected applicant for Staff membership or Staff member desiring a hearing from an adverse decision of the Medical Board shall give notice thereof in writing to the President of the Staff within ten (10) days after receipt by him/her of said decision.

B. The President of the Staff shall thereupon proceed promptly to complete the appointment of the Appellate Hearing Committee. The Appellate Hearing Committee shall begin the hearing within fourteen (14) days.

Section 4 – Conduct of Hearing

A. The hearing need not be conducted strictly according to the rules of law relating to the examination and witnesses or presentation of evidence. Any matter deemed relevant to the committee may be considered.

B. The hearing is for the purpose of resolving on an interprofessional basis, matters bearing on professional competency and conduct. Therefore, neither the affected Staff member nor the Appellate Hearing Committee shall be represented at the hearing by an attorney-at-law.

C. The Medical Board shall appoint one (1) of its members or some other Staff member to represent it at the hearing. The affected applicant or Staff member shall be entitled to be accompanied by or represented at the hearing by a member of his/her profession.

D. Both the affected application or Staff member and the Medical Board shall have the right to call and examine witnesses and to introduce evidence relevant to the issue.

E. An accurate record of the hearing shall be kept by a court reporter, recording equipment, or minutes, as determined by the committee. Except as otherwise stated herein, the hearing shall be conducted in the manner determined by the committee.

* * *